IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1129 OF 2004

Lilabai Gangurde .. Appellant

Versus

Anjanabai Mogal Barve .. Respondent

Mr.N.J.Patil for appellant

Mr.Vikram Pai for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 6TH OCTOBER 2004.

P.C.

1. Admit. Heard forthwith. Following substantial questions of law arise for determination in this second appeal:-

"1. *Whether decree/order in a counter claim can be set aside in an appeal of*

the defendant directed against the judgement/decree in a civil suit instituted by plaintiff or It is necessary for defendant to file separate appeal to challenge the same."

"2. *Whether the Lower Appellate Court can allow the appeal preferred by a defendant against the judgement of Trial court and while doing so also grant his counter-claim without framing points for determination pertaining thereto?*

2. Filing of paperbook and printing dispensed with.

3. The appellant Lilabai instituted Regular Civil Suit No.467 of 1999 in the Court of Civil Judge, Junior Division, Nashik. That suit was for relief of possession against Smt.Anjanabai, original defendant and respondent herein. The suit property is 2 Ars. of land out of Gat No.214 situated at Nandur Basak and further portion on southern side. The respondent -

original defendants set up a counter claim in this suit claiming decree of specific performance in her favour of an agreement of sale which acording to the appellant - original plaintiff before me confers no right, title and interest of whatsoever nature in favour of respondent original defendant. Be that as it may, the trial court decreed the appellant Lilabai's suit for possession and dismissed the counter claim.

4. Aggrieved by the judgement and decree of the trial court Anjanabai - respondent - original defendant preferred Civil Appeal No.453 of 2000 in the Court of District Judge, Nashik.

5. The lower appellate court has observed specifically that the civil appeal is directed against the decree in R.C.S.No.467 of 1999. However, while framing points for consideration, the lower appellate court proceeded on the basis as if the appellant is also aggrieved by the refusal on the part of the trial court to entertain her counter claim. In the process of considering legality, validity and correctness of the findings recorded by the trial court in

Regular civil suit, the lower appellate court also framed points for consideration arising out of pleadings in the trial court. After observing that the appeal challenges the judgement and decree in R.C.S.No.467 of 1999, the lower appellate court ought to have gone into correctness of the judgement and decree rendered in this civil suit. However, it has in the process gone into the merits of the counter claim as well and while passing final orders, has not only allowed the appeal preferred by the respondent herein but also decreed her counter claim. The entire exercise of the lower appellate court appears to be vitiated by apparent error inasmuch as original defendant, the appellant before the lower appellate court canvassed the plea of correctness of the decree in the regular civil suit instituted by the appellant herein. It does not appear to me that any proceedings much less a substantive appeal to challenge the dismissal of the counter claim has been filed. Assuming that without filing a separate appeal appellant - defendant could hae assailed the judgement of the trial court also on the counter claim, yet, the lower appellate court

should specifically record that aspect and also frame distinct points for determination. The lower appellate court has not applied its mind at all to this aspect.

6. With the assistance of Counsel appearing for both sides, I have gone through the judgement. It was really difficult to segregate the points framed for determination in the sense as to whether they are pertaining to suit or also for the counter claim. Counsel appearing for parties therefore agreed that the judgement and decree of the lower appellate court be set aside. In my view, interest of justice would be served if regular civil appeal No.453 of 2000 is restored to the file of the Dist.Judge Nashik for disposal on merits in accordance with law.

7. I have no doubt in my mind that such an approach of the lower appellate court raises substantial questions of law. This is a fit case for admission of this second Appeal. After entertaining it, ultimately the matter may have to be remitted back to the lower appellate court. To avoid further delay, in my view, the course

adopted by me would protect the rights and interest of both sides. Since Regular Civil Appeal No.453 of 2000 being a first appeal is restored to file, it will be open for both the sides to raise such pleas and contentions as are permissible in law on merits of the controversy. It will also be open for the defendant - original Appellant in the civil appeal before the district court to consider whether the issue of dismissal of counter claim could be raised in this Appeal or any substantive proceedings be initiated in that behalf. Leaving all contentions and issues open I allow the instant second appeal and pass the following order:-

> The judgement and decree of the lower appellate court dated 21st April 2004 in Regular Civil Appeal No.453 of 2000 is quashed and set aside. Regular civil Appeal No.453 of 2000 is restored to the file of Dist.Judge Nashik for disposal on merits and in accordance with law. Liberty to parties as above. The lower appellate court to make an endeavour to dispose of the appeal as expeditiously as

possible and in any event within a period of six months from today. The lower appellate court to act on an authenticated copy of this order. In view of the disposal of this second appeal the civil application does not survive and the same is disposed of accordingly.

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